

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT C. MUNOZ,

Petitioner,

TARLTON AND SON, INC.

Intervenor,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case No. 16-17915

Board Case Nos.
32-CA-119054
32-CA-126896

TARLTON & SON, INC.,

Petitioner,

ROBERT C. MUNOZ,

Intervenor,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case No. 17-70532

Board Case Nos.
32-CA-119054
32-CA-126896

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

ROBERT C. MUNOZ,

Intervenor,

v.

TARLTON & SON, INC.

Respondent.

Case No. 17-70632

Board Case Nos.
32-CA-119054
32-CA-126896

STATUS REPORT

1. This is the status report filed by the Petitioner in Case No. 16-71915 and the Intervenor in Case Nos. 17-70532 and 17-70632. This Court Mediator issued an Order on July 7, 2017, requiring Counsel for the National labor Relations Board file a Status Report within seven (14) days of the issuance of a decision by the United States Supreme Court in three cases then pending. DktEntry 49. The Union, which is involved in this case, files this Status Report in light of the decision of the Supreme Court in the referenced cases.

2. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, No. 16-285, together with its decisions in *Ernst & Young LLP v. Morris*, No. 16-300 and *National Labor Relations Board v. Murphy Oil USA, Inc.*, No. 16-307, cited as 584 U.S. ____ (2018). The Court held, contrary to the decision of the National Labor Relations Board and two courts below, that the National Labor Relations Act did not prohibit collective or class action waivers in arbitration agreements in the context of actions brought under the Fair Labor Standards Act. The Court relied on the arbitration policy contained in the Federal Arbitration Act, 9 U.S.C. §§ 2, 3 and 4.

3. Had the Court ruled otherwise, this would have ended the dispute in this case for the employer's arbitration agreement would have been plainly

unlawful under the National Labor Relations Act. The Court, however, addressed this issue under narrow circumstances. In each of those cases, at issue was whether the employees could be prohibited from bringing a collective action under the Federal Fair Labor Standards Act, 29 U.S.C. § 216(b). The Supreme Court did not address the myriad other issues that can arise under the circumstances where the employer maintains an arbitration provision which purports to limit the right of employees to bring actions in *fora* other than courts, actions which are not collective or class actions or many other circumstances. It does not address waivers of actions which are not preempted by the FAA. See, *Sakkab v. Luxottica Retail N. AM., Inc.*, 803 F. 3d 425 (9th Cir 2015). The Court did not address the issue presented in this case which is whether the imposition of a waiver in response to otherwise protected activity violates the Act.

4. This case presents many of the issues which the Supreme Court did not touch upon or resolve in *Epic Systems*. Those issues were all addressed in the Petitioner's Opening Brief, DktEntry 32, filed on April 14, 2017.

5. The Labor Board did not address these issues because it relied upon the sole argument which the Supreme Court rejected, that all class or collective action waivers are invalid. The issues raised by the Union are now ripe for decision by this Court in light of the decision of the Supreme Court in *Epic Systems*.

6. It should be clear from a review of the issues raised by the Union that this Court must now address many of those issues. For example, in *Epic Systems*, all parties assumed that the Federal Arbitration Act applied because what was at issue was a federal claim under the federal Fair Labor Standards Act. Here, to the contrary there is no claim under federal law. What is at issue is the maintenance of an overbroad rule in the face of a state law claim. Thus, there are significant questions whether the Federal Arbitration Act applies. There is also a transportation worker who is not covered by the Federal Arbitration Act.

7. This Court should therefore set a briefing schedule so these issues may be addressed in light of the Court's decision in *Epic Systems*. *Epic Systems* does not and cannot resolve all of these issues, although how they are presented to this Court may be changed in light of the Court's decision in *Epic Systems*.

8. Counsel is aware that there are two other cases pending before this Court in which the many of the same issues are presented. Each does present some unique issues not arising in the other cases. See, *International Association of Machinists, Machinists Lodge No. 1546, District Lodge 190 v. National Labor Relations Board*, No 16-74025 consolidated with Nos. 17-71210 and 17-81337 and *Automotive Machinists Lodge No. 1173 v. N.L.R.B.*, No. 16-70637 consolidated with Nos. 16-70694 and 16-71955. All cases involve enforcement of orders of the National Labor Relations Board. The Court should consolidate or otherwise coordinate these cases which involve many of the same issues and the National Labor Relations Board.

8. For the reasons suggested above, this Court should set a briefing schedule and coordinate the pending cases so that it may address the issues which remain in this case and the other cases.

Dated: May 25, 2018

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on May 25, 2018, I electronically filed the foregoing **STATUS REPORT** with the United States Court of Appeals, Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I further certify that a copy of this STATUS REPORT was emailed to the Circuit Mediator at Sansha_M_Cummings@ca9.uscourts.gov,

I certify under penalty of perjury that the above is true and correct.
Executed at Alameda, California, on May 25, 2018.

/s/ Karen Kempler
Karen Kempler